

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	
)	
Plaintiff,)	No. CR-15-1723-TUC-RCC-DTF
)	
vs.)	Tucson, Arizona
)	March 27, 2018
Lonnie Ray Swartz,)	9:29 a.m.
)	
Defendant.)	
)	

BEFORE: THE HONORABLE RANER C. COLLINS, JUDGE

REPORTER'S EXCERPTED TRANSCRIPT OF PROCEEDINGS

JURY TRIAL
DAY 5

(TESTIMONY OF JEFF PLOOY)

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Proceedings Reported by Stenographic Court Reporter
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CR-15-1723-TUC-RCC - March 27, 2018

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CR-15-1723-TUC-RCC - March 27, 2018

I N D E XGOVERNMENT WITNESS:DIRECTCROSSREDIRECTRECROSS

JEFF PLOOY

By Mr. Kleindienst

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By Mr. Chapman

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By Mr. Kleindienst

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By the jury

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By Mr. Kleindienst

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marijuana

19

191 Photograph of US crime scene
Vehicles, looking west

14

311 Aerial photograph of crime scene

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~~Jeff Plooy - Direct Examination~~

1 (The following excerpt is the testimony of Jeff Plooy.)

2 THE COURT: You may call your next witness.

3 MR. KLEINDIENST: The Government calls Jeff Plooy to
4 the stand, Your Honor.

5 THE CLERK: Raise your right hand, please.

09:29:30

6 (JEFF PLOOY, GOVERNMENT WITNESS, SWORN.)

7 THE CLERK: Thank you. Please be seated.

8 Please pull the microphone over to you, speak directly
9 into it.

10 State your full name for the record and please spell
11 your last name. And it does move over.

09:29:47

12 THE WITNESS: My name is Jeff Plooy, last name is
13 spelled P-L-O-O-Y.

14 THE COURT: Sir, the Rule has been invoked in this
15 case, have you been informed of that matter?

09:30:00

16 THE WITNESS: Yes, yes.

17 THE COURT: All right. Thank you.

18 Mr. Kleindienst, whenever you're ready.

19 MR. KLEINDIENST: Thank you.

20 DIRECT EXAMINATION

09:30:12

21 BY MR. KLEINDIENST:

22 Q. Good morning.

23 A. Good morning.

24 Q. Can you speak in a loud and clear voice so the folks over
25 here can hear you?

09:30:30

~~Jeff Plooy - Direct Examination~~

1 A. Okay. You can hear me or not?

2 Q. I can hear you.

3 A. Okay. Good.

4 Q. Can you tell us what you do for a living?

5 A. I am a Border Patrol Agent.

09:30:35

6 Q. And where do you work?

7 A. I work out of the Nogales Station. Currently I'm in sector
8 prosecutions as a case agent.

9 Q. What does that mean?

10 A. It means, right now what we do is we take cases from the

09:30:46

11 agents in the field, whether it be smuggling of narcotics or

12 people, or anybody that's like a possible aggravated felony,

13 basically different cases that they want to present to the

14 United States Attorney, we take them, get them all ready, do

15 all the -- you know, get everything nice in order and present

09:31:05

16 it to the United States Attorney for prosecution.

17 And then from there if it gets accepted we help

18 indict, Grand Jury, help the AUSA's investigate the cases, and

19 help them at trial, also testify at trial if need be.

20 Q. How long have you been doing that?

09:31:17

21 A. I've been doing that since January of last year.

22 Q. Is that a detail?

23 A. Yes, it is.

24 Q. Prior to going on that detail, what did you do?

25 A. Border Patrol Agent for the Nogales Station since September

09:31:24

Jeff Plooy - Direct Examination

1 2011.

2 Q. Since September 2011?

3 A. Yes.

4 Q. In the Nogales Station?

5 A. At the Nogales Station, that's where I transferred, yes.

09:31:34

6 Q. Had you worked at another Border Patrol Station prior --

7 A. Yes --

8 (Court reporter interruption.)

9 THE WITNESS: Sorry.

10 BY MR. KLEINDIENST:

11 Q. That's all right. We'll both slow down.

12 A. All right. Sounds good.

13 Q. Okay. Prior to coming to the Nogales Station in 2011, had
14 you worked at another station?

15 A. Yes, I did.

09:31:46

16 Q. And what station was that?

17 A. I worked at the Calexico, California Station from March of
18 2007 until September 2011.

19 Q. When you came to the Nogales Station in 2011, can you just
20 describe the types of things you did as a Border Patrol Agent?

09:31:58

21 A. Various things you did, either you worked on the -- worked
22 on the line, basically what we called line watch duties. So
23 either you sat at an X watching them, having surveillance on
24 the fence, or you were a roving agent going back and forth into
25 a different area, and you would respond to either things you

09:32:16

~~Jeff Plooy - Direct Examination~~

1 saw or anything anybody else called out.

2 For the most part, trying to apprehend anybody either
3 crossing illegally, or anybody trying to cross any contraband
4 through illegally. As far as anything --

5 Q. Sounds like you pretty much have done everything.

09:32:33

6 A. Pretty much, yeah. Well, let's not get crazy.

7 Q. Pardon?

8 A. Not everything. I'm sure there's a lot more.

9 Q. Okay. But quite a few things?

10 A. Yes.

09:32:42

11 Q. Let me direct your attention to the night of October 10th,
12 2012.

13 A. Okay.

14 Q. Do you recall being on duty that night?

15 A. Yes, I do.

09:32:49

16 Q. And do you recall what your assignment was?

17 A. I was a roving patrol unit, what called a POE to POE. So
18 there's two different POEs in Nogales, there's the DeConcini
19 POE and then west of it is the Mariposa POE. And it's about
20 a -- maybe about a two-mile stretch between there of either
21 it's a city -- it's a residential area, and then it's a
22 hills -- a bunch of hills. Not so much mountainous, but a
23 hilly area all the way to the other POE.

09:33:03

24 So we have Xs in that area, which are basically people
25 that are going to watch the fence or watch the area, the high

09:33:17

Jeff Plooy - Direct Examination

1 traffic areas where people cross. And then I was kind of the
2 roving person, so if there is anything crossing that area, a
3 sensor went off, a sensor going off, either -- or anybody
4 cross, the radios or cameras or another agent spotted, I would
5 go to that area and help out and assist.

09:33:33

6 Q. What time did you go on duty that day?

7 A. I believe it might have been -- it was 4:00 p.m. duty that
8 day.

9 Q. At 4:00 p.m.?

10 A. I believe so.

09:33:45

11 Q. Were you working by yourself?

12 A. That day, yes.

13 Q. What kind of vehicle were you driving?

14 A. I was driving a Tahoe, a marked Tahoe unit, with lights and
15 sirens and identifying patches.

09:33:53

16 Q. Is that like a Chevy or a GMC Tahoe?

17 A. Chevrolet Tahoe.

18 Q. Chevrolet Tahoe.

19 Do you know what a kilo unit it?

20 A. Yes, I do.

09:34:02

21 Q. How is that different from a kilo unit?

22 A. A kilo unit is a Silverado or a Ford F-150 --

23 (Court reporter interruption.)

24 THE WITNESS: I'm sorry.

25 THE COURT: Yeah, you both are racing each other. We

09:34:12

~~Jeff Plooy - Direct Examination~~

1 can't go at this pace all day.

2 THE WITNESS: Okay. Sorry. Fast talker, Your Honor.

3 So it's a pickup that will -- it has like a -- a
4 little like a holding unit on the back of it, so instead of it
5 being an open bed, it has like a holding person unit on top of
6 that so you can hold multiple people in there.

09:34:28

7 My Tahoe was just a regular SUV, but it has a cage
8 behind it so you can fit only three people in the back of that,
9 where the kilo unit you can fit, I think, six individuals in
10 there.

11 BY MR. KLEINDIENST:

12 Q. Okay. Let me direct your attention to about 11:00 o'clock
13 that night. Do you recall responding to the West International
14 fence near -- say between the Camera Pole X and the 410 X?

15 A. Yes.

09:34:59

16 Q. What was your purpose for responding there?

17 A. The cameras had called out that they saw -- they thought
18 they saw two people attempting to smuggle narcotics north of
19 the line.

20 Q. Where were you at that time when you heard that radio call?

09:35:07

21 A. I believe I was on what's called Target Range Road.

22 Q. Target Range Road?

23 A. Target Range Road. Yeah, I was responding that way.

24 Q. And how close to West International would that road be?

25 A. Anywhere from about a half mile to a mile away.

09:35:20

—Jeff Plooy - Direct Examination—

1 Q. West or east of the road?

2 A. West of it.

3 Q. West of the location?

4 A. West of the location, yes.

5 Q. And once you heard that radio broadcast, what did you do? 09:35:28

6 A. I -- as -- immediately drove to that area to respond. So I
7 had to go east on Target Range Road, hit the 19 south for maybe
8 about -- not even like an eighth of a mile, then it exits off
9 to International immediately.

10 So I went to International from Target Range through 09:35:46
11 Interstate 19.

12 Q. What happened then?

13 A. What happened then is the radio -- two other agents were
14 responding to that, it was Agent Devowe and Agent Brown. And
15 by the time -- before I'd got there the camera had called out 09:35:58
16 that the two individuals were -- went back south and jumped the
17 fence with the narcotics.

18 Q. Did you meet up with Agent Devowe and Agent Brown?

19 A. Yes, I did.

20 Q. And were they driving in the same vehicle or in a different 09:36:10
21 vehicle?

22 A. They were the two Xs, so they were in two separate
23 vehicles.

24 Q. Okay. What did you all do then after you learned that

25 the -- one or more of the people had come across had gone back 09:36:21

—Jeff Plooy - Direct Examination—

1 south to Mexico?

2 A. We did like an immediate search in the area where they --
3 camera said that they were crossed. Even though they said that
4 they thought they had the marijuana bundles on the back of
5 their backs, we just did a quick look.

09:36:35

6 And then right afterwards the camera operator let us
7 know that, hey, there's going to be a separate group crossing
8 east of the Camera Pole. So for that time we just decided
9 to -- we just kind of played coy, like we'll see if we can get
10 them to cross north, because they'll play -- they'll play this
11 cat and mouse game of running back, running south.

09:36:51

12 Instead of, you know, like -- instead of having to go
13 back and forth, back and forth, we're just going to see if we
14 can let them go north a little bit and see if we can apprehend
15 them.

09:37:05

16 So at the time when they were calling it out, we
17 stayed there and kind of laid low, kind of acted like we were
18 just talking to each other, see if they were going to cross.

19 Q. Now when you all got out of your vehicles to look for any
20 contraband because of those other individuals, did you find
21 any?

09:37:15

22 A. No, we did not.

23 Q. Where did you search?

24 A. We searched -- it's called the -- basically right in the
25 north side of West International where the cars were, and then

09:37:24

—Jeff Plooy - Direct Examination—

1 the front area of what's called the Red Brick House. It's kind
2 of a -- I don't know if it's a duplex or an apartment building,
3 but it's -- the landmark we call it the Red Brick, because it's
4 the only red brick house in that area.

5 So we searched the front of that area, we searched 09:37:38
6 around the cars, and then around the trash cans that were in
7 that vicinity.

8 Q. And your search was unsuccessful?

9 A. No, we -- yeah, it was unsuccessful there.

10 Q. Now where you and Agent Devowe and Brown were waiting, 09:37:47
11 where is that in relationship to the Camera Pole X which the
12 jury has heard about?

13 A. We were waiting directly about 100, 200 yards west of the
14 Camera Pole.

15 Q. Were you visible to anybody who was on that portion of 09:37:59
16 West I, at the Camera Pole?

17 A. If you were on the very top, yes.

18 Q. How about if you were east of the Camera Pole X?

19 A. Probably not.

20 Q. Okay. So did there come a time when you heard the 09:38:12
21 dispatcher indicate there might be some other people scaling
22 the fence onto West I?

23 A. Yes.

24 Q. About how long after the first incident did that incident
25 occur? 09:38:26

Jeff Plooy - Direct Examination

1 A. Minutes later.

2 Q. Minutes?

3 A. Yes.

4 Q. What did you do?

5 A. We laid low for a bit, stayed there talking, trying to,
6 like I said, see if we could get them a little farther north.

09:38:30

7 And then at that point I believe there was another -- we gave

8 it some time and they told -- then the camera operator, I

9 believe, told us to move in, and there was possibly other

10 people running in at the same time going for them.

09:38:48

11 Q. Okay. And what did you do exactly?

12 A. We responded. Once we heard that other people were
13 responding and that they were saying that they were going

14 south, we decided to respond. We got in our vehicles and

15 responded to the area.

09:39:02

16 Q. Do you remember who was first in line in your vehicles?

17 A. I believe it was Agent Devowe. I can't say 100 percent
18 certain. But I think he was -- I know I was the second person,
19 but I think he was the first agent that -- of us three.

20 Q. And the other agent would be?

09:39:14

21 A. Agent Brown.

22 Q. Agent Brown.

23 Where did you all drive to?

24 A. We drove to the -- basically directly -- a couple -- like

25 20 yards west of the Camera Pole, and drove and parked right

09:39:25

~~Jeff Plooy - Direct Examination~~

1 along the fence. Or 20 yards east, sorry. Twenty yards east
2 of the --

3 Q. Twenty yards east?

4 A. Twenty yards east of the Camera Pole. Sorry.

5 MR. KLEINDIENST: May I approach the witness,
6 Your Honor?

7 THE COURT: You may.

8 BY MR. KLEINDIENST:

9 Q. Let me just show you, Agent Plooy, what has been already
10 admitted as Exhibit 191.

11 (Discussion off the record between Government counsel.)

12 MR. KLEINDIENST: Let me just kind of adjust this.

13 Does the jury have it on their screen?

14 BY MR. KLEINDIENST:

15 Q. Looking at Exhibit 191, do you see a number of vehicles?

16 A. Yes.

17 Q. And do you recognize the street that the vehicles are on?

18 A. Yes, I do.

19 Q. And do you recognize this from the night of October 10th,
20 2012?

21 A. Yes, I do.

22 Q. Can you indicate to the jury which vehicle was yours, if
23 you see it in there?

24 A. Yes. The Tahoe with the -- on the very -- between the two
25 kilo units right there. (Indicating.)

Jeff Plooy - Direct Examination

1 Q. You want to put -- okay. You can just circle it.

2 A. Right there. (Indicating.)

3 Q. And the vehicle in front would be?

4 A. I believe it was Agent Devowe's.

5 Q. And the vehicle behind yours?

09:40:59

6 A. Would be Agent Brown's.

7 Q. Now did any of these vehicles have armored cages on them?

8 A. What?

9 Q. Armored cages?

10 A. I don't remember any of them having -- I know definitely

09:41:09

11 the one in front doesn't have it. I don't know if --

12 Q. Did your Tahoe have it?

13 A. My Tahoe did not, no.

14 Q. Okay. When you parked your vehicle, what did you do?

15 A. I went to where the camera operator told me that she

09:41:25

16 thought that the bundles of marijuana were hidden.

17 Q. And where exactly did you go then?

18 A. I went to the -- there's a little empty lot just north of

19 where -- maybe east and north of where these vehicles are. And

20 there's like -- it's an empty lot between two houses, has a

09:41:41

21 little bit of an embankment and a tree over there. I walked

22 towards where the tree was, and there's a bunch of grass, and

23 walked over there attempting to find the bundles of marijuana.

24 Q. Now were you armed that night?

25 A. Was I what?

09:41:55

—Jeff Plooy - Direct Examination—

1 Q. Were you armed?

2 A. Yes, I was.

3 Q. And what kind of weapon did you have with you?

4 A. On me I had my service pistol. And then in my vehicle I
5 had locked up an M4 rifle.

09:42:04

6 Q. When you exited your vehicle to go search for the
7 contraband, did you take out the long gun?

8 A. No, I did not.

9 Q. You did not. So you just had your side arm?

10 A. Yes.

09:42:14

11 Q. Did you have it drawn?

12 A. No.

13 Q. So you testified you went up on top of this berm to the
14 area where the dispatcher said the individuals had been?

15 A. Yes.

09:42:23

16 Q. Do you know who else went up there? Did you see?

17 A. As far as I know, Agent Devowe and Agent Brown went up
18 there with me.

19 Q. Anybody else?

20 A. I don't remember anybody else at the time. There was other
21 people on scene, but I don't remember seeing anybody else.

09:42:33

22 Q. Do you remember when you went up on top of the berm if the
23 canine officer from the Nogales Police Department had showed
24 up?

25 A. Yes.

09:42:44

Jeff Plooy - Direct Examination

1 Q. Do you know when you went on top of the berm if the canine
2 dog had been brought out at that point in time?

3 A. Yes.

4 Q. Do you remember seeing anybody on the fence?

5 A. Yes.

09:42:55

6 Q. And what did you see?

7 A. I saw two individuals on the top of the fence trying to
8 like make their way back south.

9 Q. Did you see anything on them, on their back?

10 A. At the time, no, I did not.

09:43:05

11 Q. You did not?

12 A. No.

13 Q. So you went on top of the berm with Agent Devowe and
14 Agent Brown. What did you do then?

15 A. I went and found the -- one of the bundles of narcotics.

09:43:13

16 Q. How far from the beginning of the berm did you find the
17 bundle?

18 A. Maybe about ten feet from the top -- from where the tree
19 was at.

20 Q. Ten feet from -- when you say where the tree was at --

09:43:27

21 A. To like where the berm -- where the berm goes up from the
22 sidewalk.

23 Q. Right.

24 A. North of that. So about -- maybe five to ten feet, if
25 that. But I want to say it was about ten feet away from the

09:43:39

Jeff Plooy - Direct Examination

1 start -- from the crest of the berm going up to where the tree
2 is at, north.

3 Q. What did you do with the bundle?

4 A. I took possession of it.

5 Q. In terms of securing it.

09:43:49

6 A. I seized it and had it on my person at the time.

7 Q. And do you know what Agent Devowe and Agent Brown were
8 doing?

9 A. Agent Devowe had grabbed the other -- he found the other
10 bundle of marijuana.

09:44:01

11 Q. How far away was the bundle that he found from the one that
12 you found, if you remember?

13 A. I couldn't -- close by, but I couldn't tell you
14 approximately how many feet. Maybe -- maybe ten feet from me.

15 Q. Ten feet from you?

09:44:13

16 A. Yeah.

17 Q. Roughly in the same area?

18 A. Pretty much the same exact area, yes.

19 Q. And what did you see Agent Brown do, if anything?

20 A. I never -- I saw him -- I saw him look -- he came up with
21 us. And after that I don't remember really seeing him. I was
22 kind of more focused, oh, great, got the bundle. I was kind
23 of -- oh, I'm done.

09:44:22

24 Q. You're done?

25 A. Yeah. I got what I'm looking for.

09:44:35

—Jeff Plooy - Direct Examination—

1 Q. Done for the night?

2 A. No, just done with the search. So once I found mine,
3 Devowe found his, all right, we got what we came for, cool.

4 Q. Is what you've just described to the jury a common
5 occurrence on your job that you would find -- you would try to
6 apprehend individuals but also search for bundles and find them
7 and secure them?

09:44:49

8 A. Yes, yeah.

9 Q. Was there anything unusual about this night?

10 A. Not at that point, no, just a normal night.

09:45:01

11 Q. Normal night.

12 If I could show you what's been marked and admitted as
13 Exhibit No. 6.

14 Can you all see that?

15 Do you recognize what's depicted on the screen as
16 Exhibit 6?

09:45:22

17 A. Yes.

18 Q. What is that?

19 A. Those are -- looks like bundles of marijuana.

20 Q. How do they compare to the bundle that you found that
21 night?

09:45:31

22 A. Look pretty similar. They all kind of have the pretty much
23 same exact look to them. They're always -- either they're
24 wrapped in burlap or cellophane. Those look like they're
25 wrapped in cellophane tape.

09:45:46

Jeff Plooy - Direct Examination

1 Q. Okay. And do they have like straps on them?

2 A. Yes.

3 Q. After you located that one bundle, you saw Devowe find and
4 secure the second bundle; correct?

5 A. Yes.

09:46:12

6 Q. What happened then?

7 A. Right around that point is when we started -- like I said,
8 me -- we started hearing rocks hitting the fence. People were
9 saying, there's rocks coming. You can see them like either on
10 the fence or hitting the ground.

09:46:28

11 Q. Did you see the rocks?

12 A. I mean, it's been five years ago, so it's a lot of stuff is
13 just like kind of blurry.

14 Q. Take your time.

15 A. One thing is I definitely remember hearing them. And then
16 you can hear them -- I remember hearing them on the fence and
17 then hearing them on the street.

09:46:41

18 Q. Okay. You could hear them but you didn't see them?

19 A. I couldn't -- I can't recall if I remember seeing them.

20 Q. Were any of the rocks getting close to where you were at?

09:46:56

21 A. Where I was at, I was in a secure location with the tree
22 covering me. So in my area I had plenty of cover due to the
23 tree right -- pretty much right above -- right on top of me and
24 where I was on the berm. I was -- none of them were going to
25 get close to me, from what I could tell.

09:47:15

Jeff Plooy - Direct Examination

1 Q. So you felt like you had secure cover from any rocks that
2 might make its way all the way up to the berm; correct?

3 A. Yes.

4 Q. Did you actually ever see a rock land on the berm?

5 A. No.

09:47:24

6 Q. No.

7 Later on that night did you go down in the street and
8 the sidewalk on West I?

9 A. Yes.

10 Q. Did you see rocks on the street and sidewalk?

09:47:31

11 A. Oh, yeah, I saw them.

12 Q. Okay. But none of the rocks that you saw on the street and
13 sidewalk, none of those came to where you were in your position
14 of cover?

15 A. No, none of them did.

09:47:42

16 Q. You said you heard some yelling on the street? What do you
17 remember about that?

18 A. Like, I can't remember exact words. I just remember
19 people -- which is a normal -- normal thing in our duties, if
20 someone's throwing rocks, someone's going to yell and tell
21 everybody, hey, heads up, rocks are coming.

09:47:57

22 Q. When you were located by the tree with the bundle, were you
23 able to see the street and the sidewalk?

24 A. A portion of it, yes.

25 Q. Okay. Did you see anybody approach the fence?

09:48:08

Jeff Plooy - Direct Examination

1 A. At the time --

2 Q. Or anybody at the fence?

3 A. I really wasn't paying too much of attention at that --
4 before the incident occurred.

5 Q. Why is that?

09:48:23

6 A. Just because I'm just laying low waiting for -- waiting for
7 either them to get done or people to leave, or -- I'm just in a
8 secure area, why am I going to go out in the open and get hit
9 and put myself in danger and then have someone else have to
10 take care of me?

09:48:38

11 So it's just -- I have -- I have secured the
12 narcotics. They're throwing rocks so that we don't get those.
13 Might as well keep it here, I got it secure. You know, I'm
14 basically a custodian of whatever is going on there with the
15 bundles, I can keep it there. Plus, I'm in a safe place so
16 there's really no reason for me to leave the area and get
17 myself in danger at the time.

09:48:51

18 Q. So you stayed where you were at?

19 A. Yes.

20 Q. You've obviously been involved where rocks have been thrown
21 over the fence in the past; correct?

09:48:59

22 A. Yes.

23 Q. The rocks that were being thrown that night that you heard,
24 did you determine if that was more of a distraction to what was
25 going on with the two people on top of the fence?

09:49:11

~~Jeff Plooy - Direct Examination~~

1 MR. CHAPMAN: Objection, leading.

2 THE COURT: Sustained.

3 BY MR. KLEINDIENST:

4 Q. What was your -- what was your conclusion as to why the
5 rocks were being thrown, the ones that you heard that night?

09:49:19

6 A. Either one of two reasons, either they want to throw rocks
7 because they -- they're mad that we're going after their
8 -- either they're doing it to distract the two guys on the --
9 on top of the fence, or because we're trying to get

10 their -- we're trying to get the narcotics that they want to --
11 they would want to come back and get.

09:49:35

12 Q. Okay. Did you ever see anybody at the fence?

13 A. At the -- before the incident happened, no.

14 Q. And let me rephrase the question just so we're clear.

15 After you heard the rocks hitting the sidewalk and the
16 street, at some point in time did you see somebody, an agent,
17 at the fence?

09:49:54

18 A. Eventually, yes.

19 Q. Eventually, yes.

20 A. Yes.

09:50:06

21 Q. How long was it after you first heard the sound of rocks
22 did you see somebody at the fence?

23 A. About four or five shots in.

24 Q. Four or five shots in?

25 A. Yes.

09:50:17

Jeff Plooy - Direct Examination

1 Q. So you heard gunshots before you saw somebody at the fence?

2 A. Yes.

3 Q. How many gunshots did you hear first?

4 A. Before I saw him?

5 Q. Um-hum.

09:50:30

6 A. Probably three to five.

7 Q. What ran through your mind when you heard the gunshots?

8 A. I don't know where these gunshots are coming from, so I
9 ducked and got as much cover as I could.

10 Q. Even more cover?

09:50:41

11 A. Yes.

12 Q. You were more concerned about the gunshots than the sounds
13 of the rocks hitting the street?

14 A. Yes.

15 Q. Did you then -- did you have an ability just to look out
16 onto the street to see what was happening at the fence?

09:50:47

17 A. Yes.

18 Q. After you heard the first round of gunshots, did you hear
19 more gunshots?

20 A. Yes.

09:51:02

21 Q. Was there a break in time between the first group and the
22 next sounds of gunshots?

23 A. Yes.

24 Q. About how long would you estimate?

25 A. A few seconds maybe.

09:51:11

~~Jeff Plooy - Direct Examination~~

1 Q. Where did you think the gunshots were coming from?

2 MR. CHAPMAN: I'm sorry, I didn't hear his response.

3 THE COURT: A few seconds maybe.

4 BY MR. KLEINDIENST:

5 Q. Where did you think the gunfire was coming from, did you
6 know?

09:51:21

7 A. I had no idea at the time.

8 Q. At the time.

9 A. No.

10 Q. Okay.

09:51:28

11 A. Like south of me, if that makes sense.

12 Q. Pardon?

13 A. You could tell they were south of my position, they weren't
14 north.

15 Q. Okay. But you felt you were in a secure position and had
16 sufficient cover?

09:51:40

17 A. Yes.

18 Q. Right. And you didn't move because you weren't sure where
19 the gunshots were coming from.

20 A. Yes.

09:51:47

21 Q. Is that a fair statement?

22 A. Yeah, that's fair.

23 Q. After you heard the first series of gunshots did you
24 eventually look at the fence?

25 A. Yes.

09:51:55

Jeff Plooy - Direct Examination

1 Q. And what did you see?

2 A. I saw Agent Swartz firing his service weapon.

3 Q. Where?

4 A. From what I could tell it looked like it was into Mexico.

5 Q. And this was after you heard the first set?

09:52:08

6 A. After the first set, yes.

7 Q. And how did you know it was Agent Swartz who was firing his
8 gun?

9 A. At the time I didn't know exactly it was him, just later on
10 knowing it was him. I just saw an agent in a green uniform
11 firing into Mexico.

09:52:21

12 Q. How many times did you believe you recall him firing?

13 A. Maybe -- maybe about three to five. Afterwards I just
14 ducked -- you know, got up real quick to see what was going on,
15 saw him, and then went back down to cover again.

09:52:42

16 Q. The same cover you had before?

17 A. Yes.

18 Q. Did you continue to watch him on the fence?

19 A. No.

20 Q. You did not?

09:52:52

21 A. No.

22 Q. Did there come a point in time where you heard more
23 gunshots?

24 A. Yes.

25 Q. So we're talking about three different times where you've

09:52:57

Jeff Plooy - Direct Examination

1 heard gunshots that night while you're up on top of the berm?

2 A. For me it was more two.

3 Q. Okay.

4 A. And so the first few I heard. And then as they were going
5 on, I saw him. And then I remember the break -- I remember a
6 few second break in time between the shots.

09:53:10

7 Q. Did you ever see Agent Swartz reload his weapon?

8 A. No, I did not.

9 Q. Are you certain?

10 A. Yes. Because I remember staying down the whole time. I
11 remember hearing him -- I mean, hearing the shots,
12 assuming -- hearing the number of shots, hearing the break in
13 time, and then going again, I made the assumption that he
14 reloaded, just from the sound.

09:53:24

15 Q. Do you recall being interviewed by Sarah Arrasmith, who is
16 with the Department of Homeland Security, just on March 5th of
17 this year about that night?

09:53:38

18 A. Yes.

19 Q. And do you recall telling her that you saw Swartz reload
20 his gun and shoot again? Does that refresh your memory?

09:53:54

21 A. No, it doesn't really.

22 Q. Okay.

23 A. I might have misspoke, because I honestly don't remember.
24 I remember just being on the ground and listening the whole
25 time.

09:54:08

~~Jeff Plooy - Direct Examination~~

1 Q. Now did you see anybody hit with any of the rocks?

2 A. I saw no person get hit.

3 Q. Did you see anybody -- anything else?

4 A. I saw what I appeared to be the dog get hit.

5 Q. What did it appear to be? What does that mean?

09:54:23

6 A. I saw -- like I said, it's unfortunate because it's been so
7 long my memory is getting real fuzzy on everything.

8 I remember seeing the dog. I remember seeing it like
9 wince almost like it got hit by a rock.

10 Q. But you didn't see a rock hit him?

09:54:39

11 A. I don't remember now if I do or not. I mean, it's like I
12 said, it's a lot of stuff, like a lot of the things that
13 happened, my memory just being so long ago, it's kind of more
14 like in like chunks.

15 I remember seeing the dog, I remember seeing it kind
16 of move. I mean, my prior testimony it looked like I said I
17 saw it. But now due to the time passing I can't remember.

09:54:52

18 Q. So you can't remember if you actually saw a rock hit the
19 dog?

20 A. No. At this time, no, I do not.

09:55:05

21 Q. Okay. But you saw him move?

22 A. I saw him move as if you're -- I saw him move like he moved
23 to like -- it was a move like if you had been hit by something,
24 or if you see something, you move -- not so much up like it was
25 scared, but more to the side, like it got hit -- something hit

09:55:22

—Jeff Plooy - Direct Examination—

1 it.

2 Q. But that was just your speculation as to what might have
3 happened?

4 A. Right now, yes.

5 Q. Okay.

6 A. Just due to my memory. Sorry.

7 Q. That's all right. That's all right. I understand.

8 MR. KLEINDIENST: May the witness come down from the
9 stand, Your Honor?

10 THE COURT: Yes.

09:55:37

11 MR. KLEINDIENST: Agent, let me bring this aerial out.

12 If you could stand to the side to make sure you don't
13 block the jurors' view. Okay?

14 THE WITNESS: Sure.

15 MR. KLEINDIENST: Can you all see that?

09:56:28

16 BY MR. KLEINDIENST:

17 Q. Do you recognize what's depicted in Exhibit No. 311, which
18 has been admitted into evidence?

19 A. Yes.

20 Q. And what it is?

09:56:36

21 A. It is an aerial view of West International.

22 Q. And you've seen photographs like this before in this case;
23 correct?

24 A. Yes.

25 Q. And can you indicate to the jury where you were earlier

09:56:43

—Jeff Plooy - Direct Examination—

1 that night at 410? Where it would be on the map?

2 A. So you're talking about when the first group -- when the
3 first group came we were in this vicinity right here.

4 (Indicating.)

5 Q. Okay. And then where did you drive your vehicle when you
6 responded to the second set of individuals that were seen by
7 dispatcher -- the camera operator?

09:57:00

8 A. It's going to be right in this area here is where we drove.
9 (Indicating.)

10 Q. And that's where you parked your vehicle?

09:57:12

11 A. Yes.

12 Q. Do you want to show us where you walked into the brush
13 area?

14 A. We walked pretty much right into this right area.
15 (Indicating.)

09:57:22

16 Q. And there's a berm there you have to climb up?

17 A. Yes.

18 Q. Pretty steep berm?

19 A. Not too bad, it's about three to five feet maybe, more or
20 less.

09:57:29

21 Q. And you want to tell us where you were when you found the
22 bundle?

23 A. Almost directly where this is right -- pretty much -- I
24 think the tree is right here, and I want to say it's right in
25 this vicinity. (Indicating.)

09:57:40

—Jeff Plooy - Direct Examination—

1 Q. Okay. So the bundle was next to a tree?

2 A. Yes, thereabouts.

3 Q. And that's where you remained when you heard the rocks
4 coming over the fence; correct?

5 A. Yes.

09:57:50

6 Q. And that's where you were when you heard the gunshots?

7 A. Yes.

8 Q. Why don't you -- just so we'll know down the road what
9 location you're talking about -- here's a pin that has your
10 initials on it. Do you want to just stick it approximately
11 where you were with the tree and the bundle on Exhibit 311?

09:58:01

12 A. I was roughly here. (Indicating.)

13 Q. And there's a pin there that has the initials JD; correct?

14 A. Or P, yes. Oh, mine right here, JP, yes.

15 Q. No, your initials are JP.

09:58:25

16 A. Yeah, okay.

17 Q. The pin next to it has the initials?

18 A. Oh, JD, yes.

19 Q. And JD do you understand would be --

20 A. Josh Devowe, I would assume.

09:58:35

21 Q. Josh Devowe.

22 And you've testified that he was up there with you and
23 you both found the bundles in the same general area; correct?

24 A. Yes.

25 Q. Okay. Can you show us where you saw -- when you finally

09:58:42

—Jeff Plooy - Direct Examination—

1 for the first time after you heard the gunfire, and then you
2 saw Agent Swartz at the fence, can you indicate roughly where
3 he was?

4 A. Approximate -- it's going to be somewhere in this like
5 vicinity right in here. (Indicating.)

09:58:59

6 Q. And you only had a partial view of the fence; is that
7 correct?

8 A. Yes, that's correct. Due to the brush and the tree, I kind
9 of had like a little bit of a -- almost like a little bit of
10 weird panoramic view. Like I couldn't see too far left or
11 right. I had like a little kind of a cone area that I could
12 see, that was about it. Especially with the cars and
13 everything.

09:59:10

14 Q. When did you finally leave your position of cover?

15 A. I would say not until the south side authorities arrived
16 and we saw their flashing lights, knowing that the scene on
17 that side was okay and cleared.

09:59:20

18 Q. About how long was it after the gunshots had ended, the
19 gunfire had ended, did the south side police respond, if you
20 can recall?

09:59:37

21 A. Maybe a couple of minutes.

22 Q. So they were there rather quickly?

23 A. Yes.

24 Q. And what made that make you leave your position, the
25 appearance of the south side police?

09:59:45

~~Jeff Plooy - Direct Examination~~

1 A. Knowing that it was -- the scene -- if there was going to
2 be anybody shooting at us or anything -- because at the time
3 we're kind of worried about more of retaliation. Okay. A, we
4 don't know if that was -- we don't know if that was totally
5 Swartz that was shooting the whole time himself. Could have 10:00:05
6 been someone else. We don't know -- if it was, if there's a
7 retaliation shot. So it's just better just to stay put.

8 Once we saw the south side authorities arrive on the
9 south side, we know that they've got -- it's going to be more
10 distracting to them seeing the lights and everything on that 10:00:19
11 side. So we just assumed, okay, scene's safe. Other people
12 were -- we kind of all made like a recollection, okay, it
13 should be okay to come out of the -- out of the woods, I guess
14 you'd say.

15 Q. Because at the time when you were undercover you didn't 10:00:30
16 have all the facts as to about what was going on.

17 A. Not at all, no.

18 Q. So there were a lot of questions in your mind as to what
19 was actually happening.

20 A. Yes. 10:00:38

21 Q. Okay. If you can resume your seat, sir. Thank you.

22 I'll take the pointer.

23 A. Okay.

24 Q. Thank you, Agent.

25 (Discussion off the record between Government counsel.) 10:01:16

—Jeff Plooy - Direct Examination—

1 BY MR. KLEINDIENST:

2 Q. Let me, if I could go back to the ELMO, and put on the
3 screen Exhibit 191, which we've looked at already.

4 A. Okay.

5 Q. Is it on the screen now?

10:01:40

6 A. Yes.

7 Oh, sorry, them.

8 Q. That's all right. You're important too. They're important
9 and you're important.

10 You identified these vehicles as Agent Devowe's,
11 yours, and Agent Brown's; correct?

10:01:55

12 A. Correct.

13 Q. What is the condition of the headlights of each of your
14 three vehicles at the time that this picture was taken?

15 A. Looks like my headlights are on.

10:02:06

16 Q. How about Agent Devowe's?

17 A. Can't really tell, just of the -- because it's cutting off
18 at the picture there.

19 Q. Right.

20 And Agent Brown behind you?

10:02:18

21 A. Looks like his are on too.

22 Q. Do you remember when you exited your vehicle or got out of
23 your vehicle to go to the berm and you left your headlights on?

24 A. They would have -- they're usually on auto, so they would
25 have been on for a few -- at least ten, 20 seconds.

10:02:33

~~Jeff Plooy - Direct Examination~~

1 Q. Well, do you see in this photograph there's a vehicle in
2 the middle of the road that has the flashing lights on?

3 A. Yes.

4 Q. Do you know what vehicle that was?

5 A. I can make an assumption, but I don't want -- I
6 wouldn't -- I would assume -- the only person I know that was
7 in the middle was Pierce, because he drove through the scene
8 afterwards.

10:02:45

9 Q. That was afterwards.

10 A. Yeah, that was afterwards.

10:02:59

11 Q. So if that was Pierce's vehicle, that was afterwards.

12 A. That would be afterwards, yes.

13 Q. And afterwards meaning?

14 A. After the incident.

15 Q. After the incident.

10:03:05

16 And so if he arrived, your headlights still seem to be
17 on; correct?

18 A. Yes. Mine were on because I remember we left -- I left my
19 car on to have the radio on.

20 Q. Okay.

21 A. So kind of more listening to the radio after everything's
22 going on, because so many people were going on. We had
23 everything on to keep the radio on just in case I didn't hear
24 my hand mic.

25 Q. Okay. So would it be -- just to refresh your recollection,

10:03:27

~~Jeff Plooy - Cross-Examination~~

1 that you probably left your headlights on when you got out of
2 your vehicle and they stayed on?

3 A. Yes.

4 MR. KLEINDIENST: Okay. That's all I have. Thank you
5 very much, sir.

10:03:44

6 THE COURT: Mr. Chapman.

7 CROSS-EXAMINATION

8 BY MR. CHAPMAN:

9 Q. Good morning, Agent Plooy.

10 A. Good morning, sir. How are you doing?

10:04:13

11 Q. Good. How are you?

12 A. Good.

13 Q. So I just want to cover -- just summarize a couple things
14 that happened that night, if that's okay with you.

15 A. Absolutely.

10:04:28

16 Q. So my understanding is that before this event occurred, you
17 saw two guys running north, and they crossed right in front of
18 you and jumped on the fence essentially?

19 A. I believe we got there afterwards.

20 Q. Okay. But you found these bundles that had been discussed
21 in this vacant lot on top of the berm, and we saw the diagram.

10:04:45

22 A. Yes.

23 Q. And that's about 50 feet from the fence; is that right?

24 A. Yes.

25 Q. Okay. And when you arrived -- or at some point after you

10:04:58

~~Jeff Plooy - Cross-Examination~~

1 arrived, rocks started falling?

2 A. Yes.

3 Q. And they were being thrown from the Mexican side?

4 A. Yes.

5 Q. Could you see them in the air?

10:05:12

6 A. From my position, no. Just because of the cover where I
7 was at, with the tree. I'd have to have an open view of it.

8 Q. Did you see -- did you hear any them pinging on the fence?

9 A. Yes.

10 Q. Did you hear any rocks falling through the trees hitting
11 the leaves?

10:05:28

12 A. I don't remember any personally, no. But it's been so long
13 it could have happened, I totally forgot about it, or it's out
14 of my memory.

15 Q. It's fair to say that rocks were falling basically on all
16 sides of the road though.

10:05:42

17 A. Yes.

18 Q. Is that true?

19 A. Yes.

20 Q. And you heard somebody say -- warn the other agents that
21 rocks were falling.

10:05:50

22 A. Yes.

23 Q. True?

24 And Agent Devowe was right next to you on the berm at
25 that point?

10:06:07

~~Jeff Plooy - Cross-Examination~~

1 A. At what point are we talking about? When I got the bundles
2 or after the --

3 Q. When you were on the berm.

4 A. At one point, yes, he was.

5 Q. Okay. And I think you testified earlier that you may have
6 seen the dog get hit by a rock. Do you remember telling the
7 Grand Jury in December of 2012 that you saw the dog get hit by
8 a large rock?

10:06:16

9 A. Yes.

10 Q. Okay. And do you remember telling investigators that at
11 least a dozen rocks were thrown, in your opinion?

10:06:38

12 A. Yes.

13 Q. And they were regular sized and some were decent size, I
14 think was how you described it?

15 A. Yes.

10:06:59

16 Q. And I think at one point you told investigators that rocks
17 were, quote, all over the place?

18 A. Yes.

19 Q. Prior to when you heard the gunshots?

20 A. Yes.

10:07:08

21 Q. You yourself had been rocked many times in the past; isn't
22 that correct?

23 A. That's correct.

24 Q. And you agree that rocks can have the -- carry the
25 potential to cause serious bodily injury?

10:07:20

~~Jeff Plooy - Cross-Examination~~

1 A. Absolutely, yes.

2 Q. And that's how you're trained as an agent?

3 A. Yes.

4 Q. From day one basically you're warned that rocks can maim or
5 kill --

10:07:32

6 A. Yes.

7 Q. -- is that correct?

8 Getting back to one of the questions that
9 Mr. Kleindienst asked you, I just want to clarify.

10 So you think that the rocks were thrown in this case
11 either because the smugglers on the other side were aggravated
12 that you found the marijuana, or because two of the smugglers
13 were still on the fence trying to escape into Mexico?

10:07:51

14 A. Yes. It could be either they were aggravated we found it
15 or they don't know that -- I mean, they couldn't tell that I
16 found it yet. So it could be that they're trying to keep us
17 away from the area, thinking that we'll clear out and they can
18 get it later.

10:08:15

19 Q. And that's a pretty common tactic, isn't it, to throw rocks
20 at agents to keep them from getting the drugs or catching the
21 smugglers that are on the American side?

10:08:27

22 A. Yes, that's correct.

23 Q. We've heard a lot of testimony that generally the
24 international border fence is dangerous and agents should stay
25 away from it unless they have to be there. I mean, that's fair

10:08:52

~~Jeff Plooy - Cross-Examination~~

1 to say, isn't it?

2 A. Yes.

3 Q. One legitimate reason to be there would be to defend a
4 fellow agent or assist a fellow agent, wouldn't it?

5 A. Yes.

10:09:04

6 Q. But typically when these smugglers get up on the fence, you
7 guys just let them go; right? Because then it becomes a safety
8 issue for both you and the smugglers.

9 A. Yes.

10 Q. I mean, if you Tase a smuggler that's 18 feet up on the
11 fence and he falls and injures himself, you're going to get
12 sued or you have to worry about that --

10:09:22

13 A. Yes.

14 Q. -- right?

15 A. Yes. All correct. That, and I can't climb that fence
16 myself, so -- I tried.

10:09:31

17 Q. Well, that's the other part of this, is if you go up the
18 fence you might hurt yourself. It's just a safety issue for
19 you as well; correct?

20 A. Yes, that's correct.

10:09:47

21 Q. But on the other hand, for example, in this case, you
22 responded in an effort to apprehend these smugglers. And
23 approaching the fence and making that effort was reasonable,
24 wasn't it?

25 A. Yes.

10:10:06

~~Jeff Plooy - Cross-Examination~~

1 Q. The point is is that it isn't Border Patrol policy to avoid
2 the fence at all costs no matter what's going on; true?

3 A. No, you don't avoid the fence. If you need to do your
4 job -- if you got to do your job, and then if you got to be
5 there by the fence, then that's what you got to do.

10:10:23

6 Q. You got to do your job, you do your job.

7 A. Yes.

8 Q. And being an agent is dangerous, isn't it?

9 A. Yes, it is.

10 Q. And chasing smugglers is dangerous, isn't it?

10:10:30

11 A. Yes, sir, it can be.

12 Q. I think you said at some point that rocks were being thrown
13 for about a minute prior to the shots being fired. Does that
14 sound right?

15 A. Sounds about right.

10:10:51

16 Q. And rocking is a common event in this area where the
17 shooting occurred, isn't it?

18 A. Yes.

19 Q. It's also a known area where scouts set up on the hills on
20 the Mexican side, and scouts exist in the United States as
21 well.

10:11:10

22 A. Yes.

23 Q. And they basically -- just like you're monitoring their
24 actions, they're monitoring your actions --

25 A. Yes.

10:11:23

~~Jeff Plooy - Cross-Examination~~

1 Q. -- with the scouts.

2 Are you trained that in all instances when someone
3 throws rocks at you you have to take cover?

4 A. No.

5 Q. Does your training allow you to use deadly force in
6 response to rocking events if the situation is appropriate and
7 you're applying your training, use of force of continuum, that
8 type of thing?

10:11:48

9 A. Yes.

10 Q. In your experience as an agent working down in Nogales,
11 have you ever observed drug smugglers to have rust on their
12 shoes or their clothing?

10:12:04

13 A. Yes.

14 Q. And what is that an indication to you of?

15 A. Indication to me that they most likely were on the bollard
16 fence.

10:12:31

17 Q. Why is that?

18 A. Because the fence over time, of years of rain, you know,
19 dew in the air, it rusts over time, and it has almost an orange
20 hue to it due to the rust.

10:12:49

21 Q. So that rust will transfer off if somebody climbs over the
22 fence --

23 A. Yes.

24 Q. -- in your experience?

25 A. Yes.

10:12:55

~~Jeff Plooy - Redirect Examination~~

1 Q. Are you aware of situations where agents have responded
2 with deadly force to rock throwings?

3 A. Yes.

4 Q. Are you aware of events where agents have been seriously
5 injured by rockings?

10:13:11

6 A. Yes.

7 Q. Would you agree with the idea that because you were in a
8 different position than Agent Swartz, your perception of the
9 threat created by these rocks may have been different from his?

10 A. Yes.

10:13:36

11 MR. CHAPMAN: No further questions.

12 THE COURT: Mr. Kleindienst.

13 REDIRECT EXAMINATION

14 BY MR. KLEINDIENST:

15 Q. Agent Plooy, you testified on direct that you don't
16 remember seeing a rock actually hit the canine; correct?

10:14:46

17 A. My memory is too fuzzy at this time for it, yes.

18 Q. And that's your best memory today?

19 A. Yes.

20 Q. Do you remember where it was when you saw that?

10:15:00

21 A. Where what was?

22 Q. The canine.

23 A. The canine? Was between -- I just remember seeing it
24 between me and the fence. It was on the road, in the middle of
25 the road.

10:15:12

Jeff Plooy - Redirect Examination

1 Q. Where in relationship to any vehicles, do you remember?

2 A. Definitely north of where my vehicle was -- I know it was
3 definitely north of where my vehicle was. I don't know if it
4 was between the other vehicles that were on the north side or
5 if it was in the middle of the road.

10:15:25

6 My view being able to see would be kind of hard to
7 tell where it was exactly.

8 Q. Okay. You didn't call out and say, hey, your canine dog
9 got hit, did you?

10 A. Not until long after.

10:15:37

11 Q. Not until long after?

12 A. Yes.

13 Q. After everything had happened?

14 A. After everything had happened I yelled at the PD officer,
15 hey, how's your dog? He's like, what do you mean? I said,
16 well, your dog got hit by a rock.

10:15:43

17 Q. And he checked it out; right?

18 A. Yeah. As far as I know, yes.

19 Q. Now you testified about rockings on cross-examination.

20 Since you've come to the Nogales Station in 2011, have you ever
21 heard about an agent in Nogales ever being hit by a rock,
22 Agent Plooy?

10:15:58

23 A. I mean, I couldn't give you an exact example, but you hear
24 about it.

25 Q. My question to you is, after you came to the Nogales

10:16:21

Jeff Plooy - Redirect Examination

1 Station, did you ever hear about an agent being hit by a rock,
2 up to the present time?

3 A. Not that I can recall. From that year time, no.

4 Q. From 2011 --

5 A. From 2011, yeah. 2010's a different story. 10:16:32

6 Q. From 2010 to the present time you're telling this jury you
7 never heard of an agent in Nogales actually get hit by a rock;
8 is that correct?

9 A. 2010, yes. Not 2011 on.

10 Q. Okay. 10:16:46

11 A. When I was detailed there that was different.

12 Q. Because you got there in 2011.

13 A. Yes.

14 Q. And that was my question. When you arrived at the Nogales
15 Station in 2011, until the present time, you can't tell this
16 jury that you know of one agent who got hit by a rock. 10:16:54

17 A. I can't recall at this time, no.

18 Q. That would be important to recall; right?

19 A. It happens so much, rockings happen all the time, and --

20 Q. I understand rockings happen -- 10:17:09

21 A. No, I'm just -- my thing is I just -- when I go home, I
22 don't really care about work, I don't really talk about it. I
23 go to work, I do my thing, I go home. I really don't really
24 talk -- I didn't really talk to other agents about it or
25 anything. So just from my -- when I was on duty, I don't 10:17:22

Jeff Plooy - Redirect Examination

1 remember anybody getting hit by a rock.

2 Q. Well, you would have heard about it at muster; right?

3 A. People talk about stuff. I mean, I don't remember.

4 Q. Okay. But you never -- you never heard of an agent being
5 hit by a rock. 10:17:34

6 A. Not that I remember, no.

7 Q. Okay. Now, he told you -- or asked you, Mr. Chapman on
8 cross-examination, about do you always take cover when you're
9 being rocked. And what was your response?

10 A. It depends on the situation. If you can, yes. 10:17:47

11 Q. If you can.

12 What if cover is not available, do you do anything
13 else to avoid being rocked? Do you move away?

14 A. It just depends on the situation. You either have to move
15 away or go forward to the threat. If the threat is there you
16 have to go engage it, I guess. 10:18:04

17 Q. If there's a reason to engage the threat.

18 A. Yes.

19 Q. If there's not a reason to engage the threat, do you move
20 forward when the rocks are coming down? 10:18:13

21 A. No.

22 Q. You've never been hit by a rock in Nogales Station.

23 A. In Nogales, no.

24 Q. Okay. And that's been, what, five, six years now?

25 A. Yeah. 10:18:23

~~Jeff Plooy - Redirect Examination~~

1 Q. You don't know, because you were more concentrated on the
2 finding the bundles, what happened on the street that caused
3 Agent Swartz to go to the fence, do you?

4 A. Yes, I don't know what happened, no.

5 Q. And you don't know where the other agents were, other than
6 Agent Devowe, were located at point in time.

10:18:48

7 A. Yes.

8 Q. You do not know?

9 A. I don't know.

10 Q. Okay. And all you know is you found the bundle, you heard
11 rocks coming down, and then you heard the gunshots.

10:18:55

12 A. Yes.

13 Q. And you looked at the fence and you saw Agent Swartz at the
14 fence shooting.

15 A. Yes.

10:19:06

16 Q. And that's all really you remember about that night.

17 A. Pretty much, yes.

18 MR. KLEINDIENST: Okay. I have nothing further.

19 THE COURT: Jurors --

20 MR. CHAPMAN: Your Honor, may I approach?

10:19:13

21 THE COURT: Sure.

22 Jurors have any questions, place them in writing.

23 (At sidebar on the record.)

24 MR. CHAPMAN: Your Honor, he opened the door again.

25 THE COURT: To what?

10:19:38

~~Jeff Plooy - Redirect Examination~~

1 MR. CHAPMAN: To specifics of rocking events.

2 THE COURT: No.

3 MR. CHAPMAN: Well, let me just --

4 THE COURT: I'll let you make your record.

5 MR. CHAPMAN: For example, between 2010 and 2014,
6 there were 1700 reported --

10:19:45

7 THE COURT: Keep your voice down.

8 MR. CHAPMAN: 1700 recorded rockings incidents on
9 Border Patrol.

10 Second, he himself was rocked three different times.

10:19:56

11 THE COURT: But not in the Nogales sector.

12 MR. CHAPMAN: Third, in Nogales an agent had a cinder
13 block thrown over the fence, landed on his face. Isn't that
14 right, Jim?

15 MR. CALLE: Agent Simoti.

10:20:11

16 MS. FELDMEIER: But that was prior to 2011.

17 MR. KLEINDIENST: Right. And those were my questions.

18 MR. CHAPMAN: What he did was really misleading. I
19 should be allowed to get into it.

20 THE COURT: No.

10:20:20

21 All right. Wait a minute, questions.

22 The area where this occurred, is it a common area for
23 rocks to be thrown at agents?

24 Where does the Border Patrol usually deploy the
25 vehicles with cages?

10:20:41

Jeff Plooy - Juror Questions

1 Did the lack of cages on the vehicles make them an
2 inappropriate option to retreat?

3 Is the Border Patrol concerned about the safety of
4 individuals who try and climb the fence?

5 Did the rocks that were being thrown pose a potential
6 threat to the safety of the individuals climbing the fence?

10:20:56

7 Do Border Patrol agents always follow the instructions
8 of the camera operators, or are there times that actually being
9 on the ground will dictate a different course of action?

10 How could those on the Mexican side know if you found
11 the bundles?

10:21:27

12 Did the location of the Border Patrol vehicles limit
13 your view of Mr. Swartz at the fence?

14 I'll ask all of them.

15 (End of discussion at sidebar.)

10:21:43

16 THE COURT: Sir, the jurors have asked several
17 questions I'm going to ask on their behalf.

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: Do Border Patrol agents always follow the
20 instructions of the camera operators, or are there times that
21 actually being on the ground will dictate a different course of
22 action?

10:22:04

23 THE WITNESS: It varies on times. Because sometimes
24 the camera operator has a great view of it, you're going to go
25 to it. But due to, especially in Nogales, our terrain, we have

10:22:20

~~Jeff Plooy - Juror Questions~~

1 some different areas as far as hills, ridges. In that aspect
2 it might look to them like, oh, okay, that person's right
3 there, but your vision, you're going to see, no, that's not
4 what's going on. Or like they'll -- I've had cases where they
5 almost -- if you kind of follow them to the letter of the law, 10:22:37
6 you might fall down a ledge or something.

7 So it just -- it's a mixture of both. You're going to
8 go -- you're usually going to go -- and especially if it's a
9 really good operator, you're going to go from where they're
10 telling you. But if your observations are seeing something 10:22:48
11 different, you're going to follow that yourself.

12 THE COURT: Is the Border Patrol concerned about the
13 safety of individuals who try and climb the fence?

14 THE WITNESS: Yes. We don't try to -- we don't try to
15 like, you know, knock them off the fence or anything. Once 10:23:04
16 it's -- the vast majority -- I mean, the only time anybody
17 tries to get anybody off the fence is if they're first climbing
18 it. There's been some circumstances of that. Even then you
19 kind of, do it.

20 Otherwise, if they're going to fall off the fence 10:23:17
21 -- kind of more, if they fall off the fence, someone's going to
22 die or someone's going to get really hurt and have to go to the
23 hospital, and then you're going -- you're dealing with the
24 consequences.

25 So I would say, yeah, we're concerned about them being 10:23:27

Jeff Plooy - Juror Questions

1 on the fence. We're not trying to knock them off the top of
2 the fence, no.

3 Q. Did the rocks that were being thrown pose a potential
4 threat to the safety of the individuals climbing the fence?

5 I just asked you that.

10:23:41

6 A. Absolutely they would have. They could have easily hit
7 their guy on top -- if the rock hit the guy on top of the
8 fence, especially if it hits them in a nice place in the head
9 and knocks them out or knocks them off balance, yeah, he could
10 have fell 18 feet to the ground.

10:23:54

11 THE COURT: The area where this occurred, is it a
12 common area for rocks to be thrown at agents?

13 THE WITNESS: Pretty much the entire West
14 International, yes. Rocks have been had for the most part in
15 this area. The whole -- from the POE to where the dead end of
16 the road is where it becomes -- well, even then past there,
17 that whole area, at one point there's been stories where
18 there's been incidents of rockings.

10:24:06

19 THE COURT: Where does the Border Patrol usually
20 deploy the vehicles with the cages?

10:24:20

21 THE WITNESS: So we have the two -- there's three
22 spots there. There's been up to five areas on that fence, but
23 at the current time there's two vehicles deployed. One by the
24 fence right where that camera pole is at.

25 There's one, it's called the 410 -- so right where the

10:24:36

Jeff Plooy - Juror Questions

1 road dead ends, the paved portion and it goes up on top of a
2 hill, the first hill to the west, that person -- there's
3 another what we call an X that that person would be facing --
4 on there facing the residential area, facing eastbound, he'll
5 be right there.

10:24:53

6 There's a third area, but that wasn't that night, it's
7 called the Blind Center. It's pretty much where the West
8 International begins on the very bottom, the eastern most part
9 of International, and they would be facing westbound.

10 THE COURT: Did the lack of cages on the vehicles make
11 them an inappropriate option to retreat?

10:25:06

12 THE WITNESS: Say that again, sir?

13 THE COURT: Did the lack of cages on the vehicles make
14 them an inappropriate option to retreat?

15 THE WITNESS: No, not necessarily. I mean, it just
16 all depends. If you're worried -- if you were worried that
17 your windshield was going to get busted, yeah, then you
18 wouldn't want to be there, per se. But if you were in your
19 vehicle, yeah, if you're in your vehicle you'd probably just
20 drive away anyways, if you thought you were in danger.

10:25:23

10:25:38

21 THE COURT: How could those on the Mexican side know
22 if you found the bundles?

23 THE WITNESS: Most -- if they knew -- if they knew
24 it's because they had scouts. They have scouts pretty
25 much -- it's a known fact they have scouts on the south side

10:25:57

Jeff Plooy - Juror Questions

1 that watches on hills. There's a lot of the hills on the
2 Mexican south side that are higher where we're at and they can
3 see it.

4 They also have people that live in the neighborhood,
5 people that drive around the neighborhood, that watch us at all 10:26:08
6 times.

7 So unfortunately, yeah, you're pretty much being
8 watched 24 seven, either by a camera yourself, or the people on
9 the north and south side. We've ran into plenty of scouts on
10 the I-19 that will -- go back and forth, and they'll drive 10:26:20
11 along that area, and if they see you with bundles, they'll call
12 the other side and tell them we got them.

13 THE COURT: Did the location of the Border Patrol
14 vehicles limit your view of Mr. Swartz on the fence?

15 THE WITNESS: Yes. Partially their vehicles, but also 10:26:36
16 the brush that I was in as well. The brush -- the -- pretty
17 much all -- I mean, there was multiple obstacles, not just the
18 Border Patrol vehicles. The Border Patrol vehicles -- there
19 was the vehicles on the north side, there were, you know,
20 pedestrian vehicles that were just parked there. And then 10:26:50
21 there was the tree that I was under that had branches, and the
22 brush and the weeds that I was under -- or in the middle as
23 well.

24 THE COURT: Any questions based upon the jurors'
25 questions, Mr. Kleindienst? 10:27:03

~~Jeff Plooy - Redirect Examination~~

REDIRECT EXAMINATION

BY MR. KLEINDIENST:

Q. I think the question was about the caged vehicles, correct, do you recall that one question?

A. Yes.

10:27:14

Q. Now, you testified that night that neither you, Agent Devowe or Agent Brown had a caged vehicle; right?

A. I mean, what kind of cage -- like a caged vehicle for detainees, yes, I had.

Q. Well, caged in the sense of being protected from rocks.

10:27:26

A. Like a rock proof.

Q. Right.

A. No, I did not have one, no.

Q. Okay. And Devowe didn't have one?

A. Not that I recall.

10:27:33

Q. And Brown didn't have one?

A. Not that I recall.

Q. Okay. Isn't it true that usually you used vehicles like that that have protection from rocking more on the east side than on the west side?

10:27:44

MR. CHAPMAN: Objection, leading.

THE COURT: Overruled.

THE WITNESS: Yes and no, because it just depended on the sup that assigned those vehicles. So sometimes -- I've been -- I've been on the 410 X with a rock-proof vehicle.

10:27:55

~~Jeff Plooy - Redirect Examination~~

1 BY MR. KLEINDIENST:

2 Q. Okay. But sometimes you've not.

3 A. No.

4 Q. And I guess my question is, are rockings more frequent on
5 the east side of the port than on the west side of the port?

10:28:05

6 A. At that time, yes.

7 Q. At that time?

8 A. Yes.

9 Q. In 2012.

10 A. I want to say yes.

10:28:14

11 Q. The fence that went up on -- in Nogales, did that decrease
12 the amount of rockings?

13 A. Yes.

14 Q. The new fence?

15 A. Yes.

10:28:26

16 Q. It did. When did the new fence go up?

17 A. Between when I left -- I was on detail -- I was on detail
18 in Nogales from December 2009 until March of 2010. When I was
19 at the Calexico station we -- Nogales was having a lot of
20 traffic. They sent people from other stations to go help them
21 out. So I was there for a three-month period of time.

10:28:42

22 So when I left there that time, the old fence was up,
23 and when I came back in September 2011, a brand new fence was
24 up.

25 Q. And that's the fence that we have today?

10:28:54

~~Jeff Plooy - Redirect Examination~~

1 A. Yes.

2 Q. And did that increase or decrease the amount of rockings?

3 A. It decreased.

4 Q. It decreased?

5 A. Yes.

10:29:00

6 Q. Why was that?

7 A. Because the old fence had a bunch of holes, it was floppy,
8 they can easily climb on top of it and throw rocks at you. It
9 was a hazard in itself.

10 Q. So the new fence made it safer down on West International?

10:29:10

11 A. It made it safer, yes.

12 MR. KLEINDIENST: I have nothing further.

13 MR. CHAPMAN: No questions.

14 THE COURT: Thank you. You may step down.

15 (Further proceedings held on the record not included in
16 this transcript.)

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CR-15-1723-TUC-RCC - March 27, 2018

C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 4th day of June, 2018.

s/Candy L. Potter
Candy L. Potter, RMR, CRR